

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

GERLING & ASSOCIATES, INC., ) CASE NO.: 2:10-CV-01074  
                                  )  
Plaintiff,                   ) MAGISTRATE JUDGE MARK R. ABEL  
                                  )  
v.                             ) PLAINTIFF GERLING & ASSOCIATES,  
GEARHOUSE BROADCAST PTY, LTD., ) INC. AND DEFENDANT GEARHOUSE  
                                  ) BROADCAST PTY, LTD.'S  
Defendant.                  ) FINAL PRETRIAL ORDER  
                                  )

**I.       APPEARANCES**

For Plaintiff Gerling & Associates, Inc. ("G&A"):

Steven E. Hillman, Esq.

For Defendant Gearhouse Broadcast PTY, Ltd. ("Gearhouse"):

Wm. Joseph Baker, Esq. and John J. Roszczyk, Esq.

**II.       NATURE OF ACTION**

- A. This is an action by G&A, which sets forth a claim for declaratory judgment, and by Gearhouse, which sets forth a counterclaim for breach of contract, breach of express and implied warranty, and unjust enrichment. G&A and Gearhouse's claims arise out of a contract ("Contract") between them to purchase a mobile television production trailer ("Trailer").
- B. The jurisdiction of the Court is invoked under Title 28, United States Code, Sections 1332, 1441, and 1446.
- C. The jurisdiction of the Court is disputed by G&A.

**III.       TRIAL LENGTH**

The estimated length of trial is four (4) to five (5) days.

#### **IV. AGREED STATEMENTS AND LISTS**

##### **A. General Nature of Claims of the Parties**

1. **G&A's Claims:** G&A states an action for declaratory judgment and seeks a declaration of the items of damage to the Trailer that are to be covered under its warranty to Gearhouse. G&A claims that the warranty was voided by the acts of Gearhouse.<sup>1</sup>
2. **Gearhouse's Claims:** Gearhouse states actions for breach of contract, breach of express warranty, breach of implied warranty, and unjust enrichment alleging that the Trailer was not constructed in accordance with the Contract; and that G&A breached the implied warranty for the Trailer. Gearhouse seeks damages in excess of \$600,000.00.<sup>2</sup>

##### **B. Uncontested Facts**

The following facts are established by the admissions in the pleadings or by stipulations of counsel:

1. G&A executed the Contract on March 9, 2010.
2. Gearhouse executed the Contract on March 17, 2010.
3. Gearhouse paid G&A \$458,581.00.
4. The Trailer shipped in July, 2010.
5. Gearhouse received the Trailer in September, 2010.

##### **C. Contested Issues of Fact and Law**

1. **Contested Issues of Fact:** There are numerous contested issues of fact, including:
  - a. Whether Gearhouse accepted the Trailer;
  - b. Whether the Trailer conformed to the Contract;
  - c. Whether G&A breached the Contract;

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<sup>1</sup> G&A has indicated it will move the Court for leave to amend its Complaint to include a claim that Gearhouse voided the warranty, and Gearhouse has indicated it will oppose G&A's motion.

<sup>2</sup> G&A has indicated it will move the Court for leave to amend its Reply to Gearhouse's Counterclaim to include the affirmative defense of "prevention of performance," and Gearhouse has indicated will oppose G&A's motion.

- d. Whether G&A breached the express warranty and the implied warranty of fitness for purpose;
  - e. Whether Gearhouse breached the express warranty; and
  - f. Whether G&A was unjustly enriched.
2. Contested Issues of Law: In addition to those implicit in the foregoing issues of fact, the contested issues of law are:
- a. Whether the warranty came into effect under the terms of the Contract; and
  - b. Whether Gearhouse accepted the Trailer.

**D. Witnesses**

- 1. G&A intends to call the following witnesses at trial:
  - a. Jennifer Fenton; and
  - b. Fred Gerling.
- 2. Gearhouse intends to call the following witnesses at trial:
  - a. Jennifer Fenton (on cross-examination; pursuant to subpoena served by Defendant);
  - b. Fred Gerling (on cross-examination; pursuant to subpoena served by Defendant );
  - c. Mark Shriver (on cross-examination; pursuant to subpoena served by Defendant);
  - d. John Newton;
  - e. Graham Elliot;
  - f. John Fisher;
  - g. Adrian Young; and
  - h. Kevin Humphrey (by trial deposition).

**E. Expert Witnesses**

Neither G&A nor Gearhouse will call expert witnesses to testify at trial. G&A objects to the introduction of testimony of Kevin Humphrey on the ground that he is an expert witness not previously identified by Gearhouse, and has filed a motion *in limine* seeking to exclude such testimony. Gearhouse contends that such testimony is admissible as fact witness testimony, and will only be offered as fact witness testimony.

**F. Depositions**

Testimony of Kevin Humphrey will be offered by transcribed deposition transcript.

**G. Exhibits**

In accordance with the Court's December 5, 2012 Order, G&A and Gearhouse will agree to and number the exhibits to be used at trial, and will submit a joint exhibit list, on or before January 28, 2013. In addition to the forthcoming joint exhibit list, the parties have exchanged their respective lists of exhibits they intend to introduce as evidence at trial.

**H. Stipulations**

G&A and Gearhouse stipulate to the authenticity of all documents produced during the litigation of this matter, but do not stipulate to their relevance or admissibility at trial.

**V. JURY INSTRUCTIONS**

In accordance with the Court's December 5, 2012 Order, G&A and Gearhouse will submit proposed agreed jury instructions on or before January 22, 2013.

## VI. REMAINING ISSUES AND OTHER MATTERS

None at this time.

Respectfully submitted,

GIFFEN & KAMINSKI, LLC

/s/ Steven E. Hillman

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s/Mark R. Abel

United States Magistrate Judge